

IN THE SUPREME COURT OF THE STATE OF NEVADA

OFFICE OF THE CLERK

K.J. BROWN, L.L.C., a Nevada limited liability company; TIMOTHY D. GILBERT and NANCY AVANZINO GILBERT, as trustees of the TIMOTHY D. GILBERT AND NANCY AVANZINO GILBERT REVOCABLE FAMILY TRUST DATED DECEMBER 27, 2013,

Appellants,

v.

ELK POINT COUNTRY CLUB HOMEOWNERS, ASSOCIATION, INC., also known as ELK POINT COUNTRY CLUB, INC., a Nevada non-profit, non-stock Corporation,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court No. 82824
District Court Case No. 2020-CV-00124

RESPONDENT'S REPLY TO APPELLANTS' RESPONSE TO
ORDER TO SHOW CAUSE

Respondent, ELK POINT COUNTRY CLUB HOMEOWNERS, ASSOCIATION, INC., also known as ELK POINT COUNTRY CLUB, INC., ("Respondent") by and through its counsel of record, hereby submit this reply to Appellants' response to the July 13, 2021 Order to Show Cause. Appellants have failed to demonstrate that this Court has jurisdiction since NRAP 3A(b)(3) does not apply in this matter and no other statute or court rule provides for an appeal from an order granting a stay.

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FACTS

The underlying District Court case arose from Appellants' complaint and request for preliminary injunction against Respondent requesting that an injunction issue to prevent Respondent from allowing homeowners to rent their properties to short-term (30 days or less) renters on the grounds that such rentals are precluded by, inter alia, the HOA's governing documents and IRC 501(c)(7) tax exempt status. The District Court granted the Appellants' request for a preliminary injunction and enjoined Respondent from allowing its homeowners to rent to both short-term and long-term renters which prompted Respondent's interlocutory appeal in the Nevada Supreme Court, Case No. 82484. On March 15, 2021, the District Court entered an Order Granting Stay of Preliminary Injunction Pending Resolution of the Interlocutory Appeal ("Stay Order"), which is the subject of Appellants' improper appeal at issue in this matter.

ANALYSIS

A. Appellants' have failed to demonstrate a statute or court rule that provides for an appeal from an order granting a stay and their appeal should be dismissed since NRAP 3A(b)(3) does not apply in this matter.

NRAP 3A(b) specifically lists the judgments and orders of a district court in a civil action which an appeal may be taken from as follows:

- (1) A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.
- (2) An order granting or denying a motion for a new trial.
- (3) An order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction.
- (4) An order appointing or refusing to appoint a receiver or vacating or refusing to vacate an order appointing a receiver.
- (5) An order dissolving or refusing to dissolve an attachment.
- (6) An order changing or refusing to change the place of trial only when a notice of appeal from the order is filed within 30 days.

(A) Such an order may only be reviewed upon a timely direct appeal from the order and may not be reviewed on appeal from the judgment in the action or proceeding or otherwise. On motion of any party, the court granting or refusing to grant a motion to change the place of trial of an action or proceeding shall enter an order staying the trial of the action or proceeding until the time to appeal from the order granting or refusing to grant the motion to change the place of trial has expired or, if an appeal has been taken, until the appeal has been resolved.

(B) Whenever an appeal is taken from such an order, the clerk of the district court shall forthwith certify and transmit to the clerk of the Supreme Court, as the record on appeal, the original papers on which the motion was heard in the district court and, if the appellant or respondent demands it, a transcript of any proceedings had in the district court. The district court shall require its court reporter to expedite the preparation of the transcript in preference to any other request for a transcript in a civil matter. When the appeal is docketed in the court, it stands submitted without further briefs or oral argument unless the court otherwise orders.

(7) An order entered in a proceeding that did not arise in a juvenile court that finally establishes or alters the custody of minor children.

(8) A special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default judgment.

(9) An interlocutory judgment, order or decree in an action to redeem real or personal property from a mortgage or lien that determines the right to redeem and directs an accounting.

(10) An interlocutory judgment in an action for partition that determines the rights and interests of the respective parties and directs a partition, sale or division.

Appellants correctly provide at the outset of their Response to the Court's Order to Show Cause that NRAP 3A(b) does not provide for the review of orders staying, suspending, or modifying orders granting preliminary injunctions. However, instead of conceding to this obvious fact, Appellants argue that the instant appeal falls under NRAP 3A(b)(3) because the *effect* of the Stay Order somehow *dissolves* the injunction. Essentially, Appellants urge the Court to adopt a subjective interpretation of NRAP 3A(b)(3) and the Stay Order to determine that the Stay Order's effect was the dissolution of a previously established injunction instead of simply a temporary stay of enforcement.

In doing so, Appellants disregard the well settled law which requires the Court to give the terms of NRAP 3A(b)(3) its plain meaning and not to look beyond the rule's clear language to determine if jurisdiction exists here. Additionally, even though Appellant's reasoning is flawed, if the Court were to dive into an interpretation of what the effect of the Stay Order has imparted, there is still no statutory basis for the instant appeal because the underlying injunction has not been dissolved.

a. The plain language of NRAP 3A(b)(3) does not allow for an appeal of an order issuing a stay of an injunction.

Typically, an order granting or denying a motion for a stay is an unappealable determination because, by its plain terms, an order granting or denying a stay of proceedings is not listed as an appealable determination. See, Brunzell Const. Co. v. Harrah's Club, 81 Nev 414, 419-20, 404 P.2d 902, 905 (1965). Appellants argue that the holding of the Brunzell Court is set apart from the instant appeal because the denial of the motion to stay in that case related to a stay of the entire underlying proceedings and not the enforcement of an injunction. However, Appellants attempt to distinguish the Brunzell Court holding is without merit as they have simply focused on whether or not the facts of the two matters are the same instead of applying the reasoning behind the holding in the precedential case to the instant case to reach a proposed conclusion. When the Brunzell Court's reasoning is analyzed, it is evident that the holding also applies here.

In reaching the Court's conclusion, the Brunzell Court clearly took the approach that it should apply the same rules of statutory interpretation when interpreting the Nevada Rules of Civil Procedure. See, also, In re Estate of Black, 367 P.3d 416, 418 (2016)("[T]he rules of statutory interpretation apply to Nevada's Rules of Civil Procedure."). It is well settled in Nevada law that when a court applies terms of a statute, the court must give a statute's terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory and that the Court may not look beyond the statute's language if it is clear and unambiguous on its face. See, Arguello v. Sunset Station, Inc., 127 Nev. 365, 370, 252 P.3d 206, 209 (2011); see also, Washoe Med. Ctr. v. Second Jud. Dist. Ct., 122 Nev. 1298, 1302, 148 P.3d 790, 792-793 (2006). Likewise, rules are enforced as written if their text is clear. See, Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004). The Brunzell Court analyzed the unambiguous list of appealable determinations and determined that an order granting or denying a stay of proceedings was not among the list and therefore, no right to appeal existed. 81 Nev 414, 419-20, 404 P.2d

902, 905 (1965). Simply because the order granting a stay in this case applies to an injunction, it does not mean that this same analysis does not apply here.

The language of NRAP 3A is clear and unambiguous leaving the Court to focus on the plain language of the rule without looking beyond it for further interpretation. The terms of NRAP 3A(b)(3) allow for appeal of an order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction. Thus, an appeal may be taken if a District Court established an injunction, refused to establish an injunction, terminated a previously established injunction, or refused to terminate a previously established injunction. The plain language of NRAP 3A(b)(3) does not provide for an appeal when an order temporarily delays the enforcement of an injunction. Furthermore, in interpreting the language of a rule or statute, this Court has repeatedly held that "the expression of one thing is the exclusion of another." Galloway v. Truesdell, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Since NRAP 3A(b)(3) does not expressly provide for an appeal of an order staying an injunction, it must be determined that no right to appeal such an order was meant to exist.

As a result, when looking at the clear, unambiguous, and plain language of NRAP 3A(b)(3), an order issuing a stay of an injunction is an unappealable determination and no further analysis is required to conclude that Appellants' appeal lacks jurisdiction to be heard.

b. Even if the Court were to explore an interpretation of the effect of the Stay Order, there is still no statutory basis for the instant appeal because the effect of the Stay Order has not dissolved the underlying injunction.

For arguments' sake, if the Court were to perform further analysis and look beyond the title of the Stay Order to determine its legal effect, the Court would find that the legal effect of the Stay Order is not to dissolve the injunction as Appellants assert. While Appellants provide authorities in support of their argument that the Court is allowed to look beyond the title of an order to determine if the legal effect of the order is to actually dissolve an injunction, this is merely a distraction from the lacking support to conclude that a stay is the effectively the same as a

dissolution. This is likely because Appellants are aware that the nature of a stay is temporary whereas a dissolution has a sense of finality which inherently cannot be treated the same.

Even for appealable interlocutory orders, this Court has consistently required that, for an appeal to be proper, the order must *finally* resolve the particular issue. For example, while a preliminary injunction is appealable under NRAP 3A(b)(3), a temporary restraining order, which is necessarily of limited duration pending further proceedings on the injunction request, is not. See, Sugarman Co. v. Morse Bros., 50 Nev. 191, 255 P. 1010 (1927). Similarly, NRAP 3A(b)(7) permits an appeal from a district court order that "finally establishes or alters" child custody, but this Court routinely dismisses appeals from interim custody orders that contemplate further district court proceedings before entry of a final custody order. See, e.g., In re Temporary Custody of Five Minors, 105 Nev. 441, 777 P.2d 901 (1989).

The effect of the Stay Order did not dissolve the underlying injunction at issue and more closely resembles that of a temporary order which is not permitted to be appealed. The actual effect of the Stay Order on the underlying injunction has merely been to temporarily halt enforcement of the injunction until the resolution of the appeal. In fact, the expiration of the Stay Order once the appeal is resolved is clear evidence that the stay of the injunction is only temporary and, therefore, has not effectively dissolved the injunction all together. See, Sicor, Inc. v. Sacks, 127 Nev. 896, 900, 266 P.3d 618, 620, 2011 Nev. LEXIS 112, *6-7, 127 Nev. Adv. Rep. 81 (providing that an order that expressly reserves a final ruling to a later time would usually not raise any question as to its interim nature). Thus, the Stay Order lacks the finality required to be appealable and more closely resembles the effects of a temporary restraining order or interim custody order which is not permitted to be appealed.

CONCLUSION

Respondent respectfully submits that this Court does not have jurisdiction under NRAP 3A(b)(3) to consider Appellant's Appeal No. 82824 of the District Court's order granting the

motion to stay the injunction since NRAP 3A(b)(3) does not apply in this matter as discussed herein and no other statute or court rule provides for an appeal from an order granting a stay.

DATED this 23rd day of August, 2021.

/s/ Prescott T. Jones

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